IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 2575 OF 2005.

1. Brihanmumbai Mahanagarpalika, a body corporate under the Bombay Municipal Corporation Act, having its office at Mahapalika Marg, Mumbai 400 001.

2. Municipal Commissioner for Brihanmumbai Mahanagar Palika having its office at Mahapalika Marg, Fort, Mumbai 400 001. ... Appellants.

Versus.

Diwakar Vishwanath Surve, Hindu, Adult, Indian Inhabitant, residing at 472-A, Daji Pandurang Bhavan, Maheshwari Udhyan(East), Mumbai 400 019. ... Respondent.

Shri A.Y.Sakhare, Senior Advocate, with Shri J.J.Xavier for the Appellants.

Shri S.S.Pandit for the Respondent.

CORAM : ABHAY S. OKA, J.

Date on which the Judgment is reserved : 12th April, 2006.

Date on which the Judgment is pronounced : 8th June, 2006.

JUDGMENT.

1. On 12th April 2006 this Appeal was finally heard with the consent of the learned Counsel appearing for the parties and the judgment was reserved.

2. The Appellants by preferring the present First Appeal have taken exception to the Judgment and Order dated 29th August 2005 passed by the learned Additional Chief Judge of the Small Causes Court at Bombay. The Respondent herein is the Appellant in an Appeal preferred under the provisions of section 217 of the Bombay Municipal Corporation Act 1888 (hereinafter referred to as "the said Act"). The Respondent is the owner of a property situated at a Road between Gokhale Road (South) and Sayani Road, Dadar, Mumbai. There was a house consisting of ground and first floor on the said property. The property was assessed at the rateable value of Rs.895/-. According to the case of the appellants on 3rd November 1997, at the time of inspection it was noticed that the Respondent had demolished the entire building and had started construction of a new RCC building on the land below the old building. A Tabulated Ward Report (for short "TWR") was put up for revision of the rateable value of the suit property at Rs.4,46,020/- NPA. A Special Notice dated 9th March 1988 was issued by the Appellants to the Respondent by which the Respondent was informed that the rateable value was proposed to be fixed at Rs.4,46,020/-. A complaint was lodged by the Respondent against the proposed revision of the rateable value. By order dated 18th June 1998, the Investigating Officer

modified the rateable value to Rs.3,36,285/- with effect from 1st October 1997. The Respondent preferred an appeal under section 217 of the said Act before the Small Causes Court which has been allowed by the impugned Judgment and order. The learned Additional Chief Judge has set aside the order dated 18th June 1998 passed by the Investigating Officer and has directed the Appellants to refund the excess tax received by them with interest at the rate of 6.25% per annum.

3. The learned Senior Counsel appearing for the Appellants submitted that though the land after demolition of the structure will have to be treated as vacant land for the purpose of assessment of the rateable value, the valuation will have to be made by assessing open land in accordance with the law. He submitted that the assessment has been made by the Appellants in conformity with the decision of the Apex Court in the case of Municipal Corporation of Greater Mumbai v/s. Polychem Ltd. reported in AIR 1974 SC 1779. He submitted that the Investigating Officer has not treated the property as a land under construction and in fact he has treated the land as a vacant land and the words "land under construction" have been used only to identify the land which is the subject of the assessment. He submitted that no evidence was led by the Respondent as regards the rent which the property is

reasonably be expected to fetch. By placing reliance on a decision of the Division Bench of this Court in the case of Naman Developers Pvt.Ltd. & another v/s. Municipal Corporation of Greater Mumbai and others reported in 2002(6) Bom.C.R. page 561, he submitted that the learned Judge of the Small Causes Court ought not to have interfered.

4. The learned Counsel appearing for the Respondent submitted that contrary to the decision of the Apex Court in the case of Polychem Ltd. (supra), the Investigating Officer has treated the property as a land under construction for the purpose of assessment of rateable value. He submitted that the Respondent has adduced evidence before the learned Judge of the Small Causes Court to show the amount of rent which the property was expected to fetch. He placed reliance on the decision of the Apex Court in the case of Municipal Corporation of Gr.Mumbai and another v/s. Kamla Mills Ltd. reported in AIR 2003 S.C. page 2998 and submitted that no interference is called for.

5. The learned Judge held that the Investigating Officer has treated the property as a land under construction (LUC for short). The learned Judge has referred to the evidence led by the Respondent which shows that the building on the said land has been

demolished for the purpose of development and the tenants in the building have been accommodated on the adjoining plot. The learned Judge held that the property could not have been treated as LUC. The learned Judge therefore held that the valuation made and rateable value fixed in respect of the said property was illegal.

6. I have considered the submissions made by the learned Counsel appearing for the parties. The Division Bench of this Court in the case of Naman Developers (supra) had an occasion to consider the law laid down by the Apex Court in the case of Polychem Ltd. (supra). In paragraph 8 of the said decision, the Division Bench held thus:

> "With regard to land under construction, the Apex Court ruled that the land upon which a building was under construction could and should be rated as the same way as vacant land. Accordingly, the Apex Court sent the matter back to the Assessor and Collector of Bombay with regard to 1060 sq.yards which was being built upon and directed that the whole land be valued for the purposes of rating in the relevant year as vacant land just as it was being done in the period immediately preceding the year 1962. **The**

Polychem is authority for the proposition that the land upon which the building is under construction should be rated in the same way as vacant land and that is ratio of the case."

(Emphasis supplied)

The Division Bench further held :

"**Besides what is directed by the Apex Court is that rating of the whole land must be valued as vacant land in the relevant year as was done immediately in the preceding year but it cannot be deduced from the aforesaid direction that the whole vacant land shall be valued for the purposes of rating in the relevant year at one rate only.** If that was so, there was no reason for remitting the matter to the Assessor for determination of rateable value for part of the land admeasuring 1060 sq.yards. The Apex Court, as a matter of fact, accepted the concept of notional division of the plot of land and for a part of land admeasuring 1060 sq.yards which was being built upon, directed the Assessor to determine the rateable value afresh, of course to be valued as vacant land. The emphasis in the direction of the Apex Court in Polychem is that whole land including the land which is

being built upon must be valued as vacant land. Take a case relating to a land of 10,000 sq.yards for the purpose of fixation of rateable value. Part of such land say about 5000 sq.yards is ditch and remaining 5000 sq.yards is a building land. Obviously in the facts and circumstances, the whole land of 10,000 sq.yards needs to be notionally divided for the purpose of rating, because the rating of the land forming ditch may be much less than the rating of remaining land which is buildable. **What has been decided by Apex Court in Polychem to be binding as ratio is that the land which is being built upon (in other words land under construction or under development) for the purpose of rating has to be valued as vacant land in the relevant year. That does not mean necessarily for whole land at the same rate."**

(Emphasis supplied)

In the case of Kamla Mills Ltd. (supra) the Apex Court dealt with a case of the property of Kamala Mills Ltd. at Mumbai. The area of the plot was 38,000 sq.meters on which structures were situated. Some of the old structures standing on a part of the land were demolished. The Municipal Corporation approved a plan for construction of a building complex consisting of

three wings. A Tabulated Ward Report was prepared. The larger plot was proposed to be bifurcated into two plots. By another TWR it was proposed that the land under the demolished structure from June 1995 formed a buildable vacant plot admeasuring 15014 sq.meters on which construction had commenced. It was proposed to treat the plot admeasuring 15014 sq.meters as a plot of land under construction and to revise its rateable value to Rs.53,50,990/- by adopting rate of Rs.3300/- per sq.meter. Consequently the rateable value of residual plot was reduced to Rs.2,36,130/-. The complaint filed by Kamala Mills Ltd. was decided and the rateable value of both the plots was fixed at Rs.31,11,595/- with effect from 1st June 1995 by adopting the market value of the land at Rs.3000/- per sq.meters. In Appeals preferred before the Small Causes Court under section 217 of the said Act, the Assessee succeeded on the basis of the Judgment of the Apex Court in the case of Polychem Ltd. The Small Causes Court held that proper rate of assessment ought to have been Rs.654/- per sq.meter. This Court confirmed the decision of the Small Causes Court. Various contentions were raised before the Apex Court on the basis of the decision in the case of Polychem Ltd. The Apex Court in paragraph 25 held thus:

"**First, that the proposition of law that**

> **rateable value is limited by the amount of the standard rent, per se does not require actual investigation, as it appears to be well settled by catena of decisions of this Court.** Secondly, we find that the High Court and the Courts below focused their attention merely on the ratio laid down in the judgment by this Court in Polychem (supra) without adverting to this proposition of law which appears to be well established."
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> (Emphasis supplied).

In paragraph 27 the Apex Court dealt with the submissions made by the Appellants herein that the said Act was a complete Code for determination of the rateable value and is not subject to the provisions of the Bombay Rent Act, 1947. The Apex Court while dealing with the said submissions in paragraph 27 held thus:

> "**In our view, the contention is unsustainable.** No doubt the Bombay Municipal Corporation Act is a legislation for fixing of the rateable value and imposing of property tax, but it nowhere defines what 'rateable value' is, except the general terms under section 154(1). If the statute had defined 'rateable value' in specific terms, then the argument may have been sustainable, as sustained in Griha Yajmanule

> Samkhya and others (supra). It must be remembered that the principle of 'standard rent' has not been invoked by reason of any requirement or declaration under the Municipal Corporation Act, but by reason of the fact that if the rateable value is the reasonable annual rent at which the property may be expected to be let, then we must consider what a hypothetical tenant would be willing to offer as rent for the property let. As has been pointed earlier, the concept of reasonableness would necessarily include the concept of an owner and a tenant who are both law abiding and do not indulge in "black marketing". If there is a rent restriction legislation which imposes a limit on the rent which can be charged, then the concept of "reasonableness" would include that restriction also. **This is the reason why in a series of judgments of this Court it has been laid down that the rateable value is limited by the standard rent determined or determinable under the provisions of the Rent Restriction Legislation"**. (Emphasis supplied).

7. In paragraphs 37 and 38, the Apex Court ultimately proceeded to hold as under:

"37. In the result, though we accept the proposition urged by the respondent that in the facts of the present case the standard rent would be the limit of the rateable value, we find that there was no material produced on record at any stage by the respondent to show what the standard rent was either in respect of the vacant land or in respect of the land on which the building was constructed and demolished or in respect of the building after it was constructed. We accept the contention of the appellant that the burden of proving this fact, while objecting to the rateable value fixed by the Commissioner, is always on the respondent-assessee. We also accept the contention of the appellant that the respondent was less than fair to the appellant in not disclosing that its property had been occupied by National Stock Exchange of India Ltd. and National Security Depository Ltd. and in not disclosing the amounts paid by them. The respondent ought to have disclosed the fact, fairly and fully, and urged the legal contentions open to it based thereupon. These facts would have justified our allowing the

appeal fully and restoring the assessment orders made by the appellants' officers. However, we are not inclined to do so for the reason that the attention of the parties has not been focused on the core issue, as a result of which, perhaps there was failure to produce relevant material before the assessor to show what was the standard rent. The interests of justice would require that the issue be considered after giving an opportunity to the respondent to discharge the burden placed upon it under law.

38. In the result, we allow the appeals and set aside the judgments of the High Court and Small Causes Court. The concerned proceedings are restored before the Assessor and Collector who shall hear and dispose the complaints after giving an opportunity to the respondent to produce such material as they may desire in support of their objections to the assessments made by the appellant."

8. Coming back to the present case, a stand has been taken by the Appellants in the written statement and in particular in paragraph 4 thereof that it was proposed to revise the rateable value of the property and assess it as a "land under construction". On the

plain reading of the written statement, it appears that the Appellants were intending to assess the property as a "land under construction" which is completely contrary to the decision of the Apex Court in the case of Polychem Ltd. It must be noted that in the present case special notice was issued proposing to fix the rateable value at Rs.4,46,020/-. The Investigating Officer modified the said amount and held that the rateable value was Rs.3,37,285/-. The assessment is made by treating the property as "land under construction". The land ought to have been assessed as a "vacant land". To that extent the learned Judge is right. The Apex Court in the case of Kamla Mills held that the burden was on the Appellant in an Appeal under section 217 to show what was the standard rent in respect of the vacant land or in respect of the land on which the building was earlier constructed and was demolished. The learned Counsel for the Respondent stated that the necessary evidence is already adduced before the Small Causes Court. However, I find that there is no discussion about the said evidence in the judgment. The learned Judge has simply restored the earlier rateable value which was fixed prior to demolition of the building. The Court has not recorded any finding as regards proper rateable value of the property after demolition of the building. In the light of what has been held in the decision of the Apex Court in the case of Kamla Mills

(supra), the impugned order will have to be quashed and set aside and the matter will have to be remanded to the Small Causes Court for determination of proper rateable value in the light of what is held in this Judgment.

Parties will be at liberty to lead further evidence.

9. Hence the following order is passed:

i) The impugned Judgment and order dated 29th August 2005 is quashed and set aside and Municipal Appeal No.109 of 1999 is restored to file.

ii) The learned Additional Chief Judge of the Small Causes Court will permit both the parties to lead evidence on a limited aspect as mentioned in paragraph 8 above.

iii) After considering the evidence which is already on record and the evidence which will be adduced by the parties after remand, the learned Judge will decide the Appeal in the light of the observations made by this Court in this Judgment.

iv) The Appeal will be decided as expeditiously as possible and preferably

on or before 31st December 2006.

v) The parties will appear before the Court of the learned Additional Chief Judge (C.R.No.18) of the Small Causes Court on 10th July 2006 at 11.00 a.m. for fixing the schedule of hearing.

vi) The Appeal is partly allowed in the above terms.

vii) The parties and the concerned Court to act on an authenticated copy of this order.

Judge.